

## Kenneth Zahn Comments on Montana House Resolution HR4

The following comments underpin portions of the brief oral testimony provided by Dr. Kenneth Zahn of Bozeman before the Natural Resources Committee of the Montana House of Representatives on January 25<sup>th</sup>, 2013 in support of proposed HJ0008.01 and testimony before the House Agriculture Committee March 26<sup>th</sup>, 2013.

I urge the Montana Legislature to resolve to oppose, as I do, the "Federal Forest Jobs and Recreation Draft bill, S. \_\_\_\_" proposed by Senator Jon Tester

(<http://www.testersenate.gov/files/documents/fjra/Forest-Jobs-and-Recreation-Act-Draft.pdf>).

My comments are based on the following analyses and conclusions about both the many key points raised by the actual wording of the proposed bill and the constantly voiced *"talking points"* of proponents of the bill.

• **Premise:** *Unlike the past and current litigious processes with respect to USFS-proposed logging projects, the draft bill directs ("mandates," "guarantees") the logging of 70,000 acres of timber in the BDL NF and 30,000 acres in the Kootenai NF under "streamlined environmental review procedures, thus assuring a steady supply of logs (with attendant jobs) for Montana mills for at least 15 years after the bill's passage.*

• **Analysis and Conclusion:** The bill's text at Sec 104(a)(1) and (2) on page 7 says that "... the Secretary [of Agriculture] shall place under contract for mechanical treatment of vegetation ..." 70,000 acres in the BDL NF and 30,000 acres in the Kootenai NF. HOWEVER, this language is really nothing more than a direction to the Secretary to PROPOSE Forest-Service-sponsored logging ("forest and watershed restoration" or "treatment") projects – just as he can do currently at any time and at his discretion without Sen. Tester's proposed bill. There is NO streamlined environmental review process for the projects outlined in this bill. As Sec 104(a)(5) on pages 13 and 14 of the draft bill clearly states: "*An environmental review of authorized forest and watershed restoration projects shall be carried out in accordance with section 104 of the Healthy Forests Restoration Act [HFRA] of 2003 (16 U.S.C. 6515...).*" When one checks section 104(a) and (b) of the HFRA, ([http://www.blm.gov/or/resources/forests/files/HFRA\\_Law.pdf](http://www.blm.gov/or/resources/forests/files/HFRA_Law.pdf)) one finds just what you'd expect -- environmental reviews of each separate project proposal are to be conducted under the public-review-and-comment, decision-making, and appeal provisions of the National Environmental Policy Act (NEPA), just as are all current USFS project proposals. Thus, there is no mandated cutting/logging (only mandated proposings), and no streamlined, shortened, or waived environmental review procedures. Through this bill, the Secretary of Agriculture [USFS] would simply be being directed to PROPOSE Federal logging ("treatment") contracts and then go through the full NEPA review process to reach a decision to actually implement the proposed logging /cutting, just as the USDA/USFS has to do now on ANY such proposed projects. The full-scale,

normal, decision-appeal and litigation options provided under the HFRA, NEPA, and the Administrative Procedures Act (APA) apply and are available to any entity or person who has participated completely in the comment and administrative appeal process. NOT ONE LOG WILL COME OUT OF THE FORESTS TO THE MILLS UNTIL THE STANDARD, NORMAL NEPA PROCESS IS COMPLETE FOR EACH PROPOSED PROJECT, AND LAWSUITS ARE DECIDED, JUST AS IS THE CASE CURRENTLY.

• **Premise:** *The proposed bill says that the Secretary shall implement the logging decision as soon as the Record of Decision (or Finding of No Significant Impact) are signed, and that after implementation of the decision begins, additional NEPA review of new and potentially significant circumstances would be done if the Secretary or a judge determine additional review is needed. Also, any additional environmental review would not impede progress of implementation of those parts of the project not subject to the additional review. Thus, logs start being delivered to the contract mills as soon as the Forest Supervisor signs the decision document and the project starts.*

• **Analysis and Conclusion:** The Record of Decision (ROD) for an EIS-level project, or the Finding of No Significant Impact (FONSI) for an EA-level project are the standard USFS supervisor/manager decision documents that result from the standard NEPA environmental review process. Once signed, the project can start BUT can also be immediately appealed administratively and – if the Reviewing Official rejects the appeal – litigated in court. NOTHING NEW IN TERMS OF PROCESS HERE. ALL THIS IS STANDARD, CURRENT PROCEDURE. Anyone who participated fully in the process can appeal and then sue the decision – including the filing for injunctive relief from project startup or continued implementation – just as they can currently. There are no protections from, or lessened potential for, the same time-consuming and contentious appeals or lawsuits the Forest Service experiences now on logging projects if this bill were to become law. The proposed bill's text at Sec 104(a)(5)(C) on page 14 simply restates standard provisions of CEQ's NEPA regulations at 42 C.F.R. part 1509.2(c) that require supplemental analysis when *"there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."* (<http://ceq.hss.doe.gov/nepa/reggs/ceq/1502.htm#1502.9>) THESE NEPA REGULATIONS HAVE BEEN IMPLEMENTED WITHIN THE DEPARTMENT OF AGRICULTURE; NOTHING NEW OR "STREAMLINED" THERE. If a litigant with standing files for injunctive relief from the decision, the possibility of a court providing *partial* injunctive relief is standard and settled law, but the court will decide what level of temporary, partial injunction will accrue – not Senator Tester's bill. NOTHING NEW OR "STREAMLINED" THERE. Bottom line is that any implication (from the premise of the talking point) that the proposed bill provides something substantially new or streamlined as to when a project will start or continue if challenged is completely incorrect. There is nothing outside standard NEPA procedure or settled jurisprudence in these portions of the proposed bill; nothing that shortens or "waives" existing processes; i.e., the bill is totally unnecessary and offers no streamlined environmental review processes since there is no "streamlining" change to currently established procedures in it.

• **Premise:** *This proposed bill establishes unique collaborative processes – developed in Montana -- that assure that key and diverse players are engaged, and will therefore generate proposed projects that will be less able to be challenged because of the extraordinary, difficult-to-achieve equitable compromises agreed to collaboratively beforehand by the environmental (“conservation”), logging, and recreation communities.*

• **Analysis and Conclusion:** Sections 103(a) and (c) on pages 7 and 8 of the proposed bill require the USDA/USFS to “identify” “collaborative groups or resource advisory committees” with which the “Secretary” (presumably to be delegated to the BDL Forest Supervisor) “shall” consult in developing and implementing each proposed project. In Sec 104(f) of the HFRA cited above, the Secretary of Agriculture [Forest] “shall facilitate” collaboration and participation among State and local governments, tribes, and interested persons during project [scope] preparation. In the proposed bill, however, one or more specific groups have to be “identified” and then consulted. This is not “facilitation of collaboration” as envisioned by the governing HFRA. Thus the Forest Supervisor must now deal with one or more already-established “identified” collaborative groups in developing initial project scopes AND implementation systems/plans – THIS IN ADDITION TO SOLICITING PROJECT SCOPING COMMENTS FROM ALL PUBLIC AND POTENTIALLY AFFECTED ORGANIZATIONS THAT IS ALREADY REQUIRED THROUGH THE STANDARD USDA/USFS NEPA NOTICING AND PUBLIC COMMENTING PROCEDURES. This may be viewed by the bill’s proponents as an important way to force the Forest Service to consult with “carefully-built” long-term advisory groups or committees on what gets proposed as to the scopes of tree-cutting and other forest restoration projects – and how each of the projects will be implemented by the Forest Supervisor. It’s interesting that the original proposing group of this initiative didn’t involve the BDL Forest staff in its “collaborative” sessions. In any case, the establishment of such groups and their “identification” by the Forest Supervisor DOES NOTHING TO SHORTEN THE NEPA-MANDATED PUBLIC REVIEW AND COMMENT PROCESS OR TO DIRECT WHAT PROJECT SCOPES OR IMPLEMENTATION PLANS/PROCEDURES THE FOREST SUPERVISOR WILL ULTIMATELY PUBLISH AND EXECUTE. Its directive nature could be intrusive upon efficient Forest Service management prerogatives; it’s also fraught with a high potential for mistrust of the Forest Service when (not “if”) the “identified” groups or committees are perceived to be “stacked” in any way toward one element of the logging-environmentalism-recreation triad of interests. Presumably, they would stay in place – and can be expanded – over the entire period of the 15-year lifetime of the bill. Regardless of the bill’s text in Section 103, there is no way for the USFS to guarantee any streamlining of the general public’s NEPA-required project scoping and agency decision-making review and appeal/litigation procedures by “consulting” with such a specifically “identified” group. Consulting these “identified” groups brings NO GUARANTEES OF PUBLIC CONSENSUS ON PROJECT SCOPES AND IMPLEMENTATION PLANS,

ANY LESS-CONTENTIOUS DISCUSSION OF ISSUES BY ELEMENTS OF THE AFFECTED PUBLICS, AND NO GUARANTEES OF FEWER LAWSUITS.

• **Premise:** *Because of the collaborative efforts of the group originally proposing this initiative to Senator Tester, and the streamlined project review processes in the proposed bill, the environmental ("conservation") community has -- with some risk -- compromised greatly by agreeing to the mandatory logging of 100,000 acres of lands in the BDL and Kootenai Forests in exchange for the establishment of > 600,000 acres of wilderness. This marvelous, job-creating collaborative process will probably lead to the proliferation of similar collaborations on logging and restoration projects elsewhere in the country.*

• **Analysis and Conclusion:** Being "collaborative" within the context of the wording of this proposed bill will do nothing to guarantee that even one tree more is ultimately logged than would be logged by the USFS simply proposing the same logging projects and starting their NEPA review processes right now WITHOUT THE TESTER BILL AT ALL. Clearly, the proposed bill actually mandates only one thing for certain upon enactment as law: the immediate establishment of another 600,000+ acres of wilderness carved from Montana's national forest and BLM public lands' resource potential – without any "exchange" for any level of "mandated," actual logging. Senator Tester has rejected any phased exchange of actually-logged acreage totals for phased partial establishment of the wilderness portions. So much for the talking point that the bill is a balanced compromise. Similarly, I am not aware that ANY environmental interest group has committed – on any of the versions of this bill – that it would guarantee in advance that it would not be a party to any lawsuit challenging the logging elements of the draft bill once the NEPA processes were completed by the USDA and/or the BLM. This is transparently only a mandatory "Wilderness" bill. Also, there is at least one coalition of at least 50 environmental ("conservation") groups that specifically went on record in 2009 as opposing the original (S-1470) Tester bill -- a draft that was very poorly written, but actually more "friendly" toward that coalition's position on wilderness than the current proposed text. These groups collectively stated that they "... Intend to see that the Tester bill is not endorsed by Congress." (See <http://testerloggingbilltruths.files.wordpress.com/2009/12/analysis-of-s-1470.pdf> and the last entry of series at: <http://testerloggingbilltruths.wordpress.com/>). It is unrealistic to project that there will be no or fewer lawsuits filed by environmental groups against USFS/BLM decisions to implement the logging-related projects. In fact, one would expect them to sue at will, as they do now, since they would have been handed >600,000 acres of new wilderness as soon as the bill is signed – even before the start of any project-level NEPA reviews. AGAIN, ANY INDIVIDUAL OR GROUP WITH ADMINISTRATIVE STANDING AFTER COMPLETION OF EACH OF THE STANDARD NEPA REVIEW PROCESSES WILL BE ABLE TO BRING SUIT AGAINST THE FOREST SERVICE/USDA/BLM PROJECT DECISIONS, REGARDLESS OF THE OUTCOMES OF THE SUPPOSEDLY WONDERFUL COMPROMISES ALLEGED TO DERIVE FROM THE SO-CALLED COLLABORATIVE SCOPING PROCESS. THE BILL IS WORTHLESS AS A

COMPROMISE AND AN EXTREMELY DAMAGING BILL FOR HELPING ADDRESS MONTANA'S NEED FOR JOBS (ESPECIALLY IN MINING AND RECREATION SERVICE SUPPORT), REVENUES FROM RESOURCE SALES AND TAXES, AND IMPROVED RECREATIONAL OUTLETS.